

\*E-filed 3/18/08\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

21X CAPITAL, LTD. and DAVID A.  
BREWER,

Plaintiffs,

v.

ROBERT WERRA and JOHN WERRA,

Defendants.

Case No. C06-04135 JW (HRL)

**ORDER ON THIRD PARTIES' (1)  
MOTION FOR PROTECTIVE ORDER  
QUASHING OR MODIFYING  
DEFENDANTS' SUBPOENAS AND (2)  
REQUEST FOR SANCTIONS**

Re: Docket No. 63

This case began with an earlier state court action involving the sale of Sunrise Technologies ("Sunrise"). Judgment was entered in that case in favor of 21X Capital ("21X") on its cross-claim against RJW Acquisitions ("RJW"). In the current action (removed on the basis of diversity), Plaintiffs sue to collect that state court judgment from individuals alleged to be alter egos of RJW.

Defendants recently served third party subpoenas on Silicon Valley Bank ("SVB").<sup>1</sup> SVB now moves for a protective order to either quash or modify the subpoenas served upon it by Defendants and for sanctions. Plaintiffs join the motion.

<sup>1</sup> Subpoenas were also served on Silicon Valley Bank's attorney (William Shoenholtz) and its Chief Compliance Officer (Suanne Mingrone). However, for convenience, the third parties are here referred to in the singular as "SVB."

**BACKGROUND**

Originally, the motion addressed the entire subpoena request. Since then, the dispute has been largely narrowed by agreement. *See* Tiller Decl. (Opp. Brief, Ex. D). As such, the resolved aspects of the protective order motion are now DENIED AS MOOT. SVB also agreed to withdraw its motion for sanctions, which is, therefore, also DENIED AS MOOT. The only remaining dispute is over the production of Plaintiff David Brewer's personal financial records.

**MOTION FOR PROTECTIVE ORDER**

The Werras want SVB to turn over financial statements pertaining to Brewer (either personally or related to Brewer's companies, e.g., 21X) that were submitted to SVB in connection with a loan to Sunrise. SVB moved for the protective order because Plaintiffs objected under California's right to financial privacy. Plaintiffs argued the motion.

**Legal Standard**

The parties agree that, for purposes of this motion, California law applies. Furthermore, there really is no dispute that this is the type of information protected by California's constitutional financial right to privacy. *See* Cal. Const., art. I, § 1; *also see Valley Bank of Nevada v. Sup. Ct. (Barkett)*, 15 Cal.3d 652, 656-57 (1975) (noting that a bank customer entertains a reasonable expectation of privacy with respect to financial information disclosed to the bank); *and see Fortunato v. Sup. Ct. (Ingrassia)*, 114 Cal.App.4th 475, 481 (2003) (emphasizing the various forms that a right to privacy in confidential customer information may take: e.g., tax returns, checks, statements, or other account information).

The disagreement is over whether this discovery should be permitted despite the constitutional protection. Because these privacy interests are not absolute, courts are to engage in a "careful balancing of the right of civil litigants to discover relevant facts, on the one hand, with the right of bank customers to maintain reasonable privacy regarding their financial affairs, on the other." *Valley Bank*, 15 Cal.3d at 656-57.

Once a right to privacy is established, the first consideration is whether the right has been waived. The mere filing of a lawsuit does not effect a complete waiver. *Vinson v. Sup. Ct.*

(*Peralta Community College Dist.*), 43 Cal.3d 833, 841-42 (1987). Rather, the court should look to whether the discovery at issue is "directly relevant to the plaintiff's claim and essential to the fair resolution of the lawsuit." *Id.* at 842 [citation omitted]. The burden of establishing direct relevance is on the Werras. *See Davis v. Sup. Ct. (Williams)*, 7 Cal.App.4th 1008, 1017 (1992) [citation omitted].

If a court determines that a right to privacy has been implicitly waived, the discovery "will not be automatically allowed." *Id.* at 1014 [citation omitted]. The court must then consider if there is a "compelling and opposing state interest" that justifies the discovery. *Id.* In other words, there should be a "careful balancing of the compelling public need for discovery against the fundamental right of privacy." *Id.* Finally, if discovery is permitted after this analysis, then the "[t]he scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner." *Id.*

#### Discussion

***Did Brewer implicitly waive his right to privacy?*** California courts have consistently required a relatively strong showing in order to prove that constitutionally protected information is "directly relevant." *See id.* at 1017 (noting that in cases where direct relevance is found, "all appear to include specific averments or reasonable interpretations drawn from the pleading which clearly place the subject of the privacy interest at issue"). It is within this framework that the court considers the Werras' argument that Plaintiffs waived constitutional protection for this information because Brewer placed his wealth "vis-a-vis the Werras' at issue."

Under California's alter ego theory,<sup>2</sup> Brewer must prove that "failure to disregard the corporate entity would sanction a fraud or promote injustice." According to Defendants, Plaintiffs allege "injustice" by claiming that the Werras used their relative financial might to maliciously prosecute the state court action in order to financially pressure Brewer into abandoning his rights to Sunrise property. Thus, Defendants want these financial records to prove that Brewer was wealthy enough to withstand the expensive state court lawsuit.

---

<sup>2</sup> It is currently disputed which state's alter ego theory should apply, but both parties are willing to assume *arguendo* that California theory applies for resolution of this motion.

1 However, whether or not Brewer is (or was) objectively wealthy seems irrelevant to  
 2 Plaintiffs' claims. If Brewer's financial wherewithal is relevant at all, what matters is what  
 3 Defendants *thought* with respect to his wealth, in pursuing the state court action as they did.  
 4 Thus, Defendants have not met the heavy burden that the discovery is "essential to the fair  
 5 resolution" of this alter ego case. *Vinson*, 43 Cal.3d at 841-42.

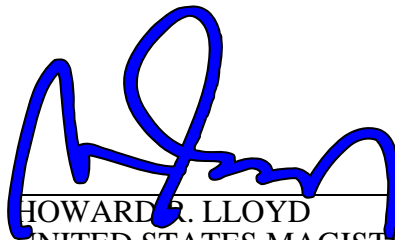
6 ***Compelling state interest justifying the discovery?*** Even assuming the Werras met their  
 7 burden on the waiver issue, this court would still have to consider whether there is a compelling  
 8 state interest justifying disclosure. Here, the Werras say that the subpoena should be enforced  
 9 because of the compelling public interest in "facilitating the ascertainment of truth in  
 10 connection with legal proceedings." *Citing Planned Parenthood v. Sup. Ct.(Foti)*, 83  
 11 Cal.App.4th 347, 359-60 (2000). Specifically, they point to the state interest in ensuring that  
 12 there is full disclosure of relevant information in the civil litigation discovery process.

13 However, the California Court of Appeal expressly rejected this as a sufficient "stand-  
 14 alone" compelling public policy. *Fortunato*, 114 Cal.App.4th at 483 (analyzing both the tax  
 15 return privilege and the constitutional right to financial privacy). The court noted that if this  
 16 assertion of public policy were considered sufficient to overcome an established privilege, then  
 17 "such an exception would swallow the rule." *Id.*

## 18 ORDER

19 The motion for a protective order with respect to the financial records is GRANTED.<sup>3</sup>

20  
 21  
 22 Dated: 3/18/08

23  
 24   
 25  
 26  
 27  
 28  
 29  
 30  
 31  
 32  
 33  
 34  
 35  
 36  
 37  
 38  
 39  
 40  
 41  
 42  
 43  
 44  
 45  
 46  
 47  
 48  
 49  
 50  
 51  
 52  
 53  
 54  
 55  
 56  
 57  
 58  
 59  
 60  
 61  
 62  
 63  
 64  
 65  
 66  
 67  
 68  
 69  
 70  
 71  
 72  
 73  
 74  
 75  
 76  
 77  
 78  
 79  
 80  
 81  
 82  
 83  
 84  
 85  
 86  
 87  
 88  
 89  
 90  
 91  
 92  
 93  
 94  
 95  
 96  
 97  
 98  
 99  
 100  
 101  
 102  
 103  
 104  
 105  
 106  
 107  
 108  
 109  
 110  
 111  
 112  
 113  
 114  
 115  
 116  
 117  
 118  
 119  
 120  
 121  
 122  
 123  
 124  
 125  
 126  
 127  
 128  
 129  
 130  
 131  
 132  
 133  
 134  
 135  
 136  
 137  
 138  
 139  
 140  
 141  
 142  
 143  
 144  
 145  
 146  
 147  
 148  
 149  
 150  
 151  
 152  
 153  
 154  
 155  
 156  
 157  
 158  
 159  
 160  
 161  
 162  
 163  
 164  
 165  
 166  
 167  
 168  
 169  
 170  
 171  
 172  
 173  
 174  
 175  
 176  
 177  
 178  
 179  
 180  
 181  
 182  
 183  
 184  
 185  
 186  
 187  
 188  
 189  
 190  
 191  
 192  
 193  
 194  
 195  
 196  
 197  
 198  
 199  
 200  
 201  
 202  
 203  
 204  
 205  
 206  
 207  
 208  
 209  
 210  
 211  
 212  
 213  
 214  
 215  
 216  
 217  
 218  
 219  
 220  
 221  
 222  
 223  
 224  
 225  
 226  
 227  
 228  
 229  
 230  
 231  
 232  
 233  
 234  
 235  
 236  
 237  
 238  
 239  
 240  
 241  
 242  
 243  
 244  
 245  
 246  
 247  
 248  
 249  
 250  
 251  
 252  
 253  
 254  
 255  
 256  
 257  
 258  
 259  
 260  
 261  
 262  
 263  
 264  
 265  
 266  
 267  
 268  
 269  
 270  
 271  
 272  
 273  
 274  
 275  
 276  
 277  
 278  
 279  
 280  
 281  
 282  
 283  
 284  
 285  
 286  
 287  
 288  
 289  
 290  
 291  
 292  
 293  
 294  
 295  
 296  
 297  
 298  
 299  
 300  
 301  
 302  
 303  
 304  
 305  
 306  
 307  
 308  
 309  
 310  
 311  
 312  
 313  
 314  
 315  
 316  
 317  
 318  
 319  
 320  
 321  
 322  
 323  
 324  
 325  
 326  
 327  
 328  
 329  
 330  
 331  
 332  
 333  
 334  
 335  
 336  
 337  
 338  
 339  
 340  
 341  
 342  
 343  
 344  
 345  
 346  
 347  
 348  
 349  
 350  
 351  
 352  
 353  
 354  
 355  
 356  
 357  
 358  
 359  
 360  
 361  
 362  
 363  
 364  
 365  
 366  
 367  
 368  
 369  
 370  
 371  
 372  
 373  
 374  
 375  
 376  
 377  
 378  
 379  
 380  
 381  
 382  
 383  
 384  
 385  
 386  
 387  
 388  
 389  
 390  
 391  
 392  
 393  
 394  
 395  
 396  
 397  
 398  
 399  
 400  
 401  
 402  
 403  
 404  
 405  
 406  
 407  
 408  
 409  
 410  
 411  
 412  
 413  
 414  
 415  
 416  
 417  
 418  
 419  
 420  
 421  
 422  
 423  
 424  
 425  
 426  
 427  
 428  
 429  
 430  
 431  
 432  
 433  
 434  
 435  
 436  
 437  
 438  
 439  
 440  
 441  
 442  
 443  
 444  
 445  
 446  
 447  
 448  
 449  
 450  
 451  
 452  
 453  
 454  
 455  
 456  
 457  
 458  
 459  
 460  
 461  
 462  
 463  
 464  
 465  
 466  
 467  
 468  
 469  
 470  
 471  
 472  
 473  
 474  
 475  
 476  
 477  
 478  
 479  
 480  
 481  
 482  
 483  
 484  
 485  
 486  
 487  
 488  
 489  
 490  
 491  
 492  
 493  
 494  
 495  
 496  
 497  
 498  
 499  
 500  
 501  
 502  
 503  
 504  
 505  
 506  
 507  
 508  
 509  
 510  
 511  
 512  
 513  
 514  
 515  
 516  
 517  
 518  
 519  
 520  
 521  
 522  
 523  
 524  
 525  
 526  
 527  
 528  
 529  
 530  
 531  
 532  
 533  
 534  
 535  
 536  
 537  
 538  
 539  
 540  
 541  
 542  
 543  
 544  
 545  
 546  
 547  
 548  
 549  
 550  
 551  
 552  
 553  
 554  
 555  
 556  
 557  
 558  
 559  
 560  
 561  
 562  
 563  
 564  
 565  
 566  
 567  
 568  
 569  
 570  
 571  
 572  
 573  
 574  
 575  
 576  
 577  
 578  
 579  
 580  
 581  
 582  
 583  
 584  
 585  
 586  
 587  
 588  
 589  
 590  
 591  
 592  
 593  
 594  
 595  
 596  
 597  
 598  
 599  
 600  
 601  
 602  
 603  
 604  
 605  
 606  
 607  
 608  
 609  
 610  
 611  
 612  
 613  
 614  
 615  
 616  
 617  
 618  
 619  
 620  
 621  
 622  
 623  
 624  
 625  
 626  
 627  
 628  
 629  
 630  
 631  
 632  
 633  
 634  
 635  
 636  
 637  
 638  
 639  
 640  
 641  
 642  
 643  
 644  
 645  
 646  
 647  
 648  
 649  
 650  
 651  
 652  
 653  
 654  
 655  
 656  
 657  
 658  
 659  
 660  
 661  
 662  
 663  
 664  
 665  
 666  
 667  
 668  
 669  
 670  
 671  
 672  
 673  
 674  
 675  
 676  
 677  
 678  
 679  
 680  
 681  
 682  
 683  
 684  
 685  
 686  
 687  
 688  
 689  
 690  
 691  
 692  
 693  
 694  
 695  
 696  
 697  
 698  
 699  
 700  
 701  
 702  
 703  
 704  
 705  
 706  
 707  
 708  
 709  
 710  
 711  
 712  
 713  
 714  
 715  
 716  
 717  
 718  
 719  
 720  
 721  
 722  
 723  
 724  
 725  
 726  
 727  
 728  
 729  
 730  
 731  
 732  
 733  
 734  
 735  
 736  
 737  
 738  
 739  
 740  
 741  
 742  
 743  
 744  
 745  
 746  
 747  
 748  
 749  
 750  
 751  
 752  
 753  
 754  
 755  
 756  
 757  
 758  
 759  
 760  
 761  
 762  
 763  
 764  
 765  
 766  
 767  
 768  
 769  
 770  
 771  
 772  
 773  
 774  
 775  
 776  
 777  
 778  
 779  
 780  
 781  
 782  
 783  
 784  
 785  
 786  
 787  
 788  
 789  
 790  
 791  
 792  
 793  
 794  
 795  
 796  
 797  
 798  
 799  
 800  
 801  
 802  
 803  
 804  
 805  
 806  
 807  
 808  
 809  
 810  
 811  
 812  
 813  
 814  
 815  
 816  
 817  
 818  
 819  
 820  
 821  
 822  
 823  
 824  
 825  
 826  
 827  
 828  
 829  
 830  
 831  
 832  
 833  
 834  
 835  
 836  
 837  
 838  
 839  
 840  
 841  
 842  
 843  
 844  
 845  
 846  
 847  
 848  
 849  
 850  
 851  
 852  
 853  
 854  
 855  
 856  
 857  
 858  
 859  
 860  
 861  
 862  
 863  
 864  
 865  
 866  
 867  
 868  
 869  
 870  
 871  
 872  
 873  
 874  
 875  
 876  
 877  
 878  
 879  
 880  
 881  
 882  
 883  
 884  
 885  
 886  
 887  
 888  
 889  
 890  
 891  
 892  
 893  
 894  
 895  
 896  
 897  
 898  
 899  
 900  
 901  
 902  
 903  
 904  
 905  
 906  
 907  
 908  
 909  
 910  
 911  
 912  
 913  
 914  
 915  
 916  
 917  
 918  
 919  
 920  
 921  
 922  
 923  
 924  
 925  
 926  
 927  
 928  
 929  
 930  
 931  
 932  
 933  
 934  
 935  
 936  
 937  
 938  
 939  
 940  
 941  
 942  
 943  
 944  
 945  
 946  
 947  
 948  
 949  
 950  
 951  
 952  
 953  
 954  
 955  
 956  
 957  
 958  
 959  
 960  
 961  
 962  
 963  
 964  
 965  
 966  
 967  
 968  
 969  
 970  
 971  
 972  
 973  
 974  
 975  
 976  
 977  
 978  
 979  
 980  
 981  
 982  
 983  
 984  
 985  
 986  
 987  
 988  
 989  
 990  
 991  
 992  
 993  
 994  
 995  
 996  
 997  
 998  
 999  
 1000

<sup>3</sup> Defendants' final effort, an offer to accept production subject to a strict confidentiality designation, also fails. Such measures do not overcome the constitutional protection. *See Davis*, 7 Cal.App.4th at 1018 (trial court's limitation of the scope of disclosure and confidentiality provision did not cure the constitutional defect).

1 THIS IS TO CERTIFY THAT A COPY OF THIS ORDER WILL BE MAILED TO:

2  
3 Thomas H. Carlson tcarlson@rjop.com, smarcus@rjop.com

4 Daniel E. Jackson djackson@kvn.com

5 Julian William Mack pmack@buchalter.com

6 Kevin Thayer Reed kreed@kvn.com, dmiller@kvn.com, efiling@kvn.com

7  
8 Aaron Paul Silberman aps@rjop.com, fyh@rjop.com

9 Jon Burgess Streeter jstreeter@kvn.com, efiling@kvn.com, mcanales@kvn.com,  
10 sharmison@kvn.com

11 Khari Jamil Tillery kjt@kvn.com, dbm@kvn.com, efiling@kvn.com

12 Courtney Towle ctowle@kvn.com, efiling@kvn.com, sgiminez@kvn.com

13  
14 **5:06-cv-4135 Notice has been delivered by other means to:**

15 Peter Gerard Bertrand  
16 Buchalter Nemer  
17 333 Market St 25th Fl  
18 San Francisco, CA 94105-2130

19  
20  
21 Counsel are responsible for transmitting this order to co-counsel who have not signed up for e-  
22 filing.

23  
24 Dated: 3/18/08

\_\_\_\_\_  
/s/ KRO  
Chambers of Magistrate Judge Howard R. Lloyd